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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Customs Appeal No. 994 of 2010

(Arising out of Order-in-Appeal No. RT/38-39/LTU/MUM/2010 dated 30.09.2010 passed by Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai)

Commissioner of CE & ST (LTU), Mumbai **Appellant**
8th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Vs.

M/s. Maneesh Exports **Respondent**
Plot No. 16/7, TTC Industrial Area,
Turbhe, Navi Mumbai 400 705.

WITH

Customs Appeal No. 995 of 2010

(Arising out of Order-in-Appeal No. RT/38-39/LTU/MUM/2010 dated 30.09.2010 passed by Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai)

Commissioner of CE & ST (LTU), Mumbai **Appellant**
8th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Vs.

M/s. Maneesh Exports **Respondent**
Plot No. 16/7, TTC Industrial Area,
Turbhe, Navi Mumbai 400 705.

AND

Excise Appeal No. 36 of 2011

(Arising out of Order-in-Appeal No. RT/50/LTU/MUM/2010 dated 15.10.2010 passed by Commissioner of Central Excise & Service Tax (Appeals), LTU, Mumbai)

Commissioner of CE & ST (LTU), Mumbai **Appellant**
8th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Vs.

M/s. Maneesh Exports **Respondent**
Plot No. 16/7, TTC Industrial Area,
Turbhe, Navi Mumbai 400 705.

Appearance:

Shri Prasad Paranjape, Advocate, for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/85076-85078/2022**

Date of Hearing: 04.01.2022
Date of Decision: 04.01.2022

PER: SANJIV SRIVASTAVA

Revenue has preferred these appeals against the orders-in-appeal of the Commissioner (Appeals), Central Excise and Service Tax Large Tax Payer Unit, Mumbai as detailed in table below:

Appeal No C/ 994 & 995/2010		
Order In Appeal No RT/38-39/LTU/Mum/2010 dated 01.10.2010		
Order-In-Original No/date	**Duty demanded & Confirmed**	**Penalty Imposed**
07/LTU/GLT-4/ 2009/AC/NIK dated 30.12.2009	**90,57,330/- U/S 72 of the Customs 1962 along with Act, interest U/S 28AB ibid**	**1,00,000/- U/S 117 of Customs Act, 1962**
08/LTU/GLT-41 2009/AC/NIK dated 05.01.2010	**19,71,183/- U/S 72 of the Customs 1962 along with Act, interest U/S 28AB ibid**	**1,00,000/- U/S 117 of Customs Act, 1962**
Appeal No E/36/2011		
Order in Appeal No RT/50/LTU/Mum/2010 dated 13.10.2010		
08/LTU/2009/ ADDL/MK dated 12.05.2009	**38,71,681/- U/S 11(A)(1) of the Central Excise Act, 1944 along with Act, interest U/S 11AB ibid**	**38,78,681 /- U/S 11 AC of the Central Excise Act, 1944**

1.2 Two appeal are filed under Customs Act, 1962 and third one under Central Excise Act, 1944. By the order dated 05.12.2019 in appeal No E/36/2011, bench ordered for clubbing of the three appeals stating as follows:

"Both sides submit that Customs Appeals arising out of the same fact bearing No C/994-995/2010 have also been filed by the Revenue. They request that the said Customs appeals also be tagged with the present appeal and heard together. Registry is directed to tag all these 3 appeals and list them for disposal on 09.01.2020."

2.1 Respondent is a 100% EOU unit and operating under 'Letter of Permission' dated 01.01.2002, issued by the Development Commissioner, Special Economic Zone. They had started their commercial production from 18.01.2004. The letter of permission mentioned the finished goods for exports as "Capsules/Tablets of Pharmaceutical Formulations."

2.2 The Letter of Permission was subsequently amended by the letter dated 15.05.2006 to include "Dry Syrup and Suspensions, Injections" in list of final products for export.

2.3 The respondent were procuring imported/ indigenous raw material without payment of duty as provided under Notification No 52/2003-CUS dated 31.3.2003 and Notification No 22/2003-CE dated 31.03.2003.

2.4 It was noticed that the respondents had used the raw materials so procured during the period prior to 15.05.2006, for manufacture of the goods which were subsequently included in the "letter of permission".

2.5 Show cause notices were for issued demanding Customs/ Excise duty on raw materials procured claiming exemption as above and used for finished products, which were not listed in their 'Letter of Permission'.

2.6 These show cause notices were adjudicated as per the order in originals as referred to in para 1, above. Aggrieved by the order of adjudicating authorities, respondents filed appeal before the Commissioner (Appeals).

2.7 The Commissioner (Appeals) set aside the orders-in-original and allowed the appeal filed by the respondents.

2.8 Aggrieved by the impugned order, revenue has preferred identically worded appeals stating as follows:

- The amendment to Letter of Permission dated 15.05.2006 has been issued for approval of Broad Banding items of manufacture viz. Dry Syrup, Suspension & Injection in terms of para 6.34 (5) of Hand Book of Procedures 2004-09 and enhancement of capacity in terms of para 6.34 (4) of Appendix 14 I of Hand Book of Procedures 2004-09 and revision in Export Import Projections in terms of para 6.6 (a) of Foreign Trade Policy 2004-09.
- As the approval of Broad Banding, enhancement of capacity and revision in Export Import Projections have been made as per the Hand Book of Procedures 2004-09, it cannot be construed that the amendment to LOP is effective retrospectively from 01.01.2002 (the date of original LOP which had been amended by amendment dated 15.05.2006) as the Foreign Trade Policy 2004-09 is effective only from 2004 onwards and has not been issued under the Foreign Trade Policy in force in 2002. As such, the amendment will be effective only from 15.05.2006 (date of amendment).
- From the plain reading of amendment dated 15.5.2006 to LOP, it is seen that, amendment portion is embodied in para-2, for the requirement of import of capital goods for remaining period of three years 2006-07 to 2008-09. The Asstt. Development Commissioner, SEEPZ SEZ, at para-1, have noted that, the unit has commenced production w.e.f 18.4.04. This noting is in respect of the condition given at para 3 of the LOP dated 1.1.2002, whereby it is insisted that the unit should commence the "commercial production" within three years from date of permission (1.1.2002). It is not in connection/relation with the amendment portion which follows subsequently. Therefore it is opined that, said "commercial production" is relatable to the items of manufacture i.e. "capsules/tablets of pharmaceutical formulations" and not for the items amended thereafter.
- The broad banding permission dated 15.5.06, was not a clarification on any matter. Hence the commissioner (A)'s findings contending that, it applies retrospectively, is not acceptable on merits, as the assessee has functioned

beyond the scope of original LOP itself and without either informing and obtaining permission from the Development Commissioner or the jurisdictional AC/DC as provided under Section 65 of the Customs Act, 1962 read with Sr. No. A(8) of the Supplementary Regulations under the manufacture and other operations in Warehouse Regulations, 1966 as amended vide Notification no. 44/98-Cus dated 2.7.98.

- The respondent had procured raw materials without payment of duty based on CT-3 Certificate that the said materials were to be used in the manufacture and export of capsules and tablets. However the finished goods manufactured and exported using the materials were Suspensions and Injections, for which no permission was given by the Asstt. Development Commissioner, SEEPZ SEZ, Mumbai till the amendment dated 15.05.2006.
- Therefore duty demand was confirmed in the Order-In-Original by denying the benefits of exemption.
- Conclusion drawn by the Commissioner (Appeals) that as the classification of the product is not affected by its form and the fact that the pharmaceutical formulation is already included in their LOP dated 01.01.2002, non inclusion of the said specific form of dispersion is a technical lapse and can be condoned", does not hold any merit.
- The reliance placed by the Commissioner (Appeals) on the order of Bangalore bench of tribunal in case of Synergies Dooray Automotive Ltd 2008-226-ELT 529 (Tri-Bang), cannot be justified.
- Thus Commissioner (Appeals) has allowed the appeals contrary to Law.

3.1 We have heard Shri Sanjay Hasija, Superintendent, Authorized representative for the revenue and Shri Prasad Paranjape, Advocate, for the respondent.

3.2 The respondent has filed cross objections in appeal No. E/36/2011, which has not been numbered but taken as written submissions on behalf of them.

3.3 Arguing for the revenue, learned authorized representative while re-iterating the grounds of appeal also placed reliance on the following decisions:

- Pet Plastics Ltd. [2017 (354) ELT (T-Mum)]
- Varalakshmi Exports [2021-TIOL432-HC-Maf-Cus]
- Bombay Hospital Trust [2005 (188) ELT 374 (T-LB)]
- Bombay Hospital Trust [2005 (201) ELT 555 (Bom)]
- Grant Medical Foundation [2015 (315) ELT (SC)]
- Raju Fabric [2004 (166) ELT 468 (T-Mum)]
- Ferro Alloys Corp Ltd [1995 (77) ELT 310 (T-LB)]
- A N Impex [Order No A/718-719/14/CSTB/C-I dated 27.03.2014]

3.4 Arguing for the respondent learned counsel placed reliance on the following decisions:-

- G T Cargo Fitting India Pvt Ltd [2019 (370) ELT 1181 (T-ALL)]
- Honeywell Technology [2008 (231) ELT 592 9T-Bang)]
- Synergies Dooray Automotive Ltd. {2008 (226) ELT 529 (T-Bang)]
- Sanghi Spinners (I) Ltd [2007 (209) ELT 43 9T-Bang)]
- Prime Furnishing Pvt Ltd [2006 (199) ELT 257 (T-Mum)]
- Dharampal Lal Chand Chug [2015 (323) ELT 753 (Bom)]

4.1 We have carefully considered the impugned order along with the grounds of appeal and the arguments made during the course of hearing.

4.2 While deciding the appeals Commissioner (Appeals) has by observed as follows:

"5. The appellant is a 100% EOU manufacturing unit. It is not alleged that duty free raw materials procured under dispute are not used for manufacture of goods by 100% EQU unit that are subsequently exported. The only allegation was that the finished goods that are exported are not included in their 'Letter of Permission' issued by the Development Commissioner, Special Economic Zone.

6. I have gone through the Letter of Permission (LOP) dated 01.01.2002, wherein it is found that the said LOP is granted for manufacture of capsules/tablets of Pharmaceutical formulation. It is contended the appellant that Gel/Suspension/injection are different forms of pharmaceutical formulation and classification of the pharmaceutical formulation remains same irrespective of its form i.e. tablet capsule/gel/suspension/injection. I have gone

through Chapter heading No 3003 & 3004 of the Central Excise Tariff pertaining to medicaments. It is found that medicaments irrespective of its form i.e. syrup, dry syrup, tablets capsules gel etc, falls under the same subheading. As classification of the product is not affected by its form and pharmaceutical formulation is already included in their LOP dated 01.1.2002, I find that non inclusion of the said specific form of dispersion is a technical lapse and can be condoned.

7. I have also gone through amended LOP dated 15.5.2006 issued by the Assistant Development Commissioner, SEEPZ SEZ, Mumbai, under which Assistant Development Commissioner, approves for broad Banding of disputed items manufactured i. e. Dry syrup, Suspension & Injection, in terms of Para 6.34 (5) of Hand Book of Procedures 2004-09. In the said Letter of Permission dated 15.5.2006, Assistant Development Commissioner has put remark that it is noted that the unit has commenced production w. e. f. 18.01.2004. Since, amended letter of permission is issued by the Assistant Development Commissioner, SEEPZ, SEZ, Mumbai and they have noted that the unit commenced production from 18.01.2004. From this it is clear that the said EOU is entitled for all benefits pertaining to said products from 18.01.2004, as ĘOU. The Assistant Development Commissioner, SEEPZ, SEZ, Mumbai has amended LOP on 15.5.2006 with retrospective effect dated 18.1.2004. Moreover use of duty free raw material procured by the appellant for manufacture of pharmaceutical formulation is not disputed and export of these goods are also not disputed in SCN or in the impugned orders. The appellant has quoted the following judgment in their favour

Synergies Dooray Automotive Ltd 2008-226-ELT 529 (Tri-Bang), wherein it is held that:

"Export-Oriented Unit 100% - Demand - Imported ingots used in manufacture of finished product, Aluminium wheels which are exported - Aluminium dross generated during the process as by-product - Excisability of Aluminium dross immaterial - Proviso to para 3 of Notification No. 52/2003-Cuş. not applicable to Aluminium dross a by-product cleared to domestic Tariff Area - Demand in respect of imported Aluminium ingots relatable to Aluminium Dross not warranted - Section 28 of Customs Act,

1962. - There is no dispute that all the ingots, which are imported are used in the manufacture of Aluminium wheels and these wheels have been exported. In the manufacture of the wheels, while melting the Aluminium ingots, the Aluminium Dross comes as a by-product. In a case like this, where the finished product is aluminium wheels and which is excisable, the proviso cannot be invoked at all for any reason. A clear reading of the Notification reveals that the proviso will be applicable only when the finished goods are non-excisable. The question of excitability of Aluminium Dross etc. is not at all relevant where the finished products are excisable. No duty can be demanded on the imported Aluminium Ingots relatable to the Aluminium Dross generated as all ingots have been used in the manufacture of final products (Aluminium wheels) which have been exported. (paras 5, 5.1, 5.2)".

4.3 Undisputedly the Letter of Permission of 2002, was initially in respect of finished goods namely, *"Tablets and Capsules of Pharmaceutical Formulations".* Respondents have vide their letter dated 20.03.2006 had requested for addition of finished products in LOP of 2002. The relevant extracts of the said letter are reproduced below:

"Sub: Addition of finished product in LOP no PER/30(2001)SEEPZ/EOU-79/01-02 dated 01.01.02.

......

We there for request you to add Suspension, Dry syrup & Injection to our finished product list (list of manufactured item at EOU)."

As requested by the respondents the LOP dated 01.01.2002 was amended vide letter dated 15.05.2006 which is reproduced below:

"Ref:- Letter of Permission No. PER/30(2001)/SEEPZ/EOU-79/01-02, dtd, 1.1.2002, as amended, issued for manufacture and export of Capsules/Tablets of Pharmaceutical Formulations under 100% EOU Scheme.

Sub:- Approval for Broad Banding of item of manufacture viz. Dry syrup, Suspension & Injection and Enhancement of Capacity and revision in Export Import Projections reg.

Gentlemen.

I am directed to refer to your letter dated 20.3.2006 and subsequent letter dtd. 31.3.2006 and did. 27.4.2006 on the subject cited above and to say that in view of the circumstances explained therein, Development Commissioner, SEEPZ SEZ approves your request for Broad Banding items of manufacture viz. Dry syrup, Suspension & Injection in terms of para 6.34 (5) of Hand Book of Procedures 2004-09, enhancement of capacity in terms of para 6.34 (4) of Appendix 14 I of Hand Book of Procedures 2004-09 and revision in Export Import Projections in terms of para 6.6 (a) of Foreign Trade Policy 2004-09,covered by the Letter of Permission No PER 30(2001) SEEPZEOU-79/01-02, dtd. 1.1.2002, as amended

1. It is noted that unit has commenced production w.e.f, 18.012004.

2. Consequent upon the above approval, the items of manufacture and annual capacity mentioned in the aforesaid Letter of Permission No. PER/243(1998) EDU/221/98, dtd. 02.12.1998, as amended, stands amended to read as follows:

Sl. No.	***Items of Manufacture***	***Unit***	***Annual Capacity***
1	***Capsules/Tablets of Pharmaceutical Formulations.***	***Nos***	***1,33,35,000/- (One Crore Thirty Three Lakhs Thirty Five Thousand only)***
2	***Dry Syrup and Suspensions.***	***Nos.***	***60,00,000 Nos(Sixty Lakhs Nos. Only)***
3	***Injections***		
	Details of injection and syrups		

3. The approval is subject to the following conditions :

i. The entire (100%) production excluding rejects and sales in the Domestic Tariff Area (DTA) as per provision of foreign Trade Policy shall be exported.

ii. It is noted that you are required to achieve the positive NFE as prescribed in the Foreign Trade Policy, failing which you may be liable for penal action.

iii. It is noted that you require imports of capital goods worth US$ 6,12.880/- for remaining period of three years 2006-07 to 2008-2009.

iv. *It is noted that you have projected export turnover/export performance of US $ 73,02,000/ for the period from 2006-07 to 2008-2009.*

v. ***The Letter of Permission No. PER/30/2001/SEEPZ/EOU-79/01-02, dtd. 1.1.2002, as amended, as amended, under reference stands amended to the above extent.***

vi. ***All other terms and conditions mentioned in the Letter of Permission No. PER/30(2001)/SEEPZ/EOU-79/01-02, did. 1.1.2002, as amended, shall remain unchanged.***

vii. *You are requested to confirm acceptance of the above terms and conditions.*

viii. *You are requested to execute Legal Agreement in the enclosed format in respect of revision of projections within 15 days from the receipt of this letter,*

ix. *Please keep this letter attached to the original Letter of Permission No. PER/30(2001)/SEEPZEOU-79/01-02, dd, 1.1.2002, as amended and acknowledge the receipt."*

4.4 It was never the case of the revenue that the raw materials as imported were not used for the manufacture of the finished goods finally exported as required for fulfillment of export obligations of the EOU. Appellants have in their reply before the adjudicating authority taken the stand that all the injections and suspensions were exported after May, 2006. Adjudicating authority has in his order 30.12.2009 specifically recorded *"..most of the inputs, imported duty free during the period March 2005 to April 2006, were used in the manufacture of finished goods in the form of injections and suspensions and exported after may 2006 and therefore there is no question of irregularity as alleged or otherwise and as long as the goods have been exported the duty cannot be recovered..."*

4.5 The issue of achieving the NFE as per the LOP over the period of entire five years (including annual achievement) from the date of start of commercial production is the question to be examined by the DGFT who has issued the LOP. It is not for the Custom/ Central Excise Authorities to interfere in the manner. It is not even the case for the revenue that any investigations were undertaken by the DGFT in this regards. It is not even the case

that respondents have not achieved the NFE as per the LOP. In case of Sanghi Spinners (I) Ltd, tribunal has held as follows:

*"**3.** On a careful consideration of the matter and perusal of the impugned order, we find that the Commissioner has accepted the permission granted by the Development Commissioner to clear the goods in DTA. There is no dispute in the fact that clearance has been made in terms of the permission granted. Therefore in the light of the cited judgment, the Customs Department cannot take a view contrary to that of the Development Commissioner in interpreting the EXIM policy. The Commissioner has examined the issue in great detail and has dropped the proceedings. There is no merit in the appeal and the same is rejected."*

4.6 The entire case of revenue is based on the fact that appellant had manufactured these finished products which were not as per LOP, using the raw material imported duty free. We do not find any merits in these arguments as the appellants have consumed the duty free raw material for achieving the export obligations on yearly basis and on whole as per the LOP issued to them and amended from time to time. No evidence has been produced by the revenue that the terms of LOP have been violated in terms of quantity or value as specified in the said LOP. IN absence of any such allegation or finding by the relevant authorities the violations if any cannot be termed to be anything more than technical violations as pleaded by the respondents and held by Commissioner (Appeals).

4.7 We also take note of the decision of the tribunal in the case of G T Cargo Fitting India Pvt Ltd, referred to by the counsel for the respondents where following has been held in similar circumstances:-

*"**4.** It is seen that during the course of adjudication the appellant approached their Development Commissioner, who amended the earlier LOP by including the item namely "lashing belt system" and modified the earlier existing LOP dated 27-9-2000 vide his communication dated 9-5-2011. The Lower Authorities have not accepted such modification on the ground that the same stands modified with effect from 9-5-2011 and as*

such cannot be held to be available and applicable during the period prior to the said date.

***5.** On going through the said letter dated 9-5-2011 we note that the same is not a fresh LOP issued by the Development Commissioner and the same is to the effect that the item lashing belts system stands included in the earlier LOP dated 27-9-2000 which is modified to that extent. Inasmuch as it is a modification of the earlier LOP, we are of the view that the same has to be held as a clarificatory amendment by the Development Commissioner in which case the Revenue's objection would get overruled."*

4.8 In his submissions learned authorized representative has referred to the decision in the case of Pet Plastics Ltd, which is distinguishable on facts as the same is in respect of goods which were manufactured contrary and cleared in DTA, contrary to the permission granted and the permission granted was never amended or modified.

"9. It is clear from the above that goods stated to have been cleared to the Domestic Tariff Area (DTA) was neither tablet nor capsule which was the form of the product specification in Letter of Permission issued to M/s Suprapti Plastics Ltd. We did not find any amendment in permission that would allow the production of goods in form other than tablet nor capsule. The Food & Drug Administration have also denied the according of permission for such manufacture. The appellants have also not been able to produce any permission from the Drugs Controller for manufacture of pharmaceutical products.

***10.** It is abundantly clear that the goods cleared into the domestic tariff area were not such as were entitled to be cleared at the concessional rate of duty available to Export Oriented Units. Therefore, the clearance has been of goods that were not in conformity with the permission granted under the Foreign Trade Policy. Consequently, the goods are liable for confiscation as ordered by the adjudicating authority and to duties thereof. There is, thus, no flaw in the demand for duty and is imposition of penalty."*

4.9 The decision in case of A N Impex referred to by the learned authorized representative too is distinguishable, because in that case the proceedings in the matter were also initiated by DGFT. Para 8 of the decision is reproduced below:

"8. We find that the appellants set up an 100% EOU under the Letter Of Permission dated 19.11.1997 issued by the DGFT. As per the Letter Of Permission, the appellants were allowed to manufacture recycled granules of plastics, garbage bags of plastics, plastic Rolls. in the present proceedings the demand is confirmed in respect of imported raw material and locally procured raw material without payment of duty which is not used in the manufacture of garbage bags of plastics. The appellants are not disputing the fact that in fact the appellants manufactured plastic bags which are used as packing material. The contention of the appellants is that subsequently Letter Of Permission was amended and appellants were allowed to manufacture plastic bags also. ***The DGFT has also issued Show cause notice to the appellants.*** *The demand is for the period prior to 25.8.2003. Prior to 25.8.2003, the appellants were allowed to manufacture garbage bags of plastics. Appellants had not manufactured garbage bags of plastics out of the raw material procured without payment of customs/excise duty under Notification N.53/97 Cus dated 3.6.97 and Notification No. 1/95 CE dated 4.1.95. As the appellants had not fulfilled the conditions of the above mentioned notifications, the demand in respect of raw materials which was procured without payment of duty of excise is upheld."*

4.10 The other decisions referred to by the revenue are in respect of limitation and the jurisdiction. Since none of those issues are under consideration as we uphold the order of Commissioner (Appeals) on the merits of issue, we are not commenting on these decisions relied upon at the time of arguments.

4.11 In appeal Nos. C/995/2010 and E/36/2011, the amount of duty involved is less than Rs.50,00,000/- and the same could have been dismissed as withdrawn in terms of litigation policy Circular No. F. No. 390/Misc/116/2017-JC dated 22.08.2019.

5.1 The appeals filed by the revenue are dismissed.

(Order pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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